1963

Eldred R. Hamilton et al v. Salt Lake County Sewerage Improvement District No. 1 et al : Respondents' Reply to Brief of Amici Curiae

Utah Supreme Court

Golden W. Robbins; Attorney for Plaintiffs-Respondents;
J. Lambert Gibson; Attorney for Defendants-Appellants;

IN THE SUPREME COURT of the STATE OF UTAH

ELDRED R. HAMILTON, RICHARD CARLQUIST, W. GWYNNE PAGE, EARL L. MAYNARD and FARNES G. EGBERT, in behalf of themselves and as a class suit for all other persons similarly situated,

Plaintiffs-Respondents

vs.

SALT LAKE COUNTY SEWERAGE IMPROVEMENT DISTRICT NO. 1, WOODROW S. MICKELSON, WENDELL GROVER and JOSEPH A. WORKMAN, Trustees,

Defendants-Appellants.

Case No. 9910

RESPONDENTS' REPLY TO BRIEF OF AMICI CURIAE

Appeal from the Summary
Judgment of the 3rd District Court
for Salt Lake County
Hon. A. H. Ellett, Judge

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INTRODUCTION

The brief of Amici Curiae misinterprets the statutes, makes statements contrary to the record, and attempts to inject new issues into the appeal. The decision of this Court will not affect future bond elections other than those districts, if any, which intend to hold elections in violation of the statutes.

The decision will not cloud or affect outstanding bonds because the outstanding bonds are in the hands of bona fide purchasers, and the districts would be estopped

from asserting any defect under the general law, and by virtue of Section 17-6-3.11 which provides that a complaint in the bond contest must be filed within 30 days. This Court held in the case of *Tygessen v. Magna Water Company,* 13 U. 2d 397, 375 P.2d 456, at page 457:

> "The simple answer seems to be that a contest may be precipitated within 30 days after the resolution is published. The general law is that irregularities are waived after the bonds are sold."

There is a mis-statement on page 2 of Amici Curiae Brief. There was no list of the registered voters delivered to the Judges of the Sewer district.

The Salt Lake County Sewerage Improvement District No. 1 is different from any other Sewer District because it is attempting to take in territory, which according to the master plan of Salt Lake County, is to remain agricultural land. There will be no need for a sewer except within a small area where the towns of Riverton, South Jordan and Draper are located.

ARGUMENT

POINT I

THE JUDGMENT IS CORRECT IN HOLDING THAT THE SPECIAL BOND ELECTION WAS VOID BY REASON OF FAILURE TO OBTAIN A CERTIFIED LIST OF THE QUALIFIED REGISTERED VOTERS RESIDING WITHIN THE BOUNDARIES OF THE SPECIAL IMPROVEMENT DISTRICT.

Amici Curiae on page 4 of their brief state: "Section 17-6-3.1 in its entirety deals only with the method of selecting the board of trustees of the improvement district." We respectfully submit that Section 17-6-3.1 deals with both the election of trustees and bond elections. We quote the following provisions which specifically relate to bond elections, pages 606 to 608 Utah Code Annotated, 1953 Volume 2:

> "3. Upon a petition, signed by at least ten (10) per cent of the persons eligible to vote on a bond issue in any district created under this act being filed with the board of county commissioners, thirty (30) days prior to the date set for the bond election, or ninety (90) days prior to the date set for succeeding elections, requesting that an election for trustees be held, * * *"
>
> * * * *
>
> "An election of the elective member or members of the board of trustees, not appointed as a representative of a municipality, shall be held at the time of holding the bond election. * * *"
>
> "* * * At any time within thirty (30) days after the board of trustees has entered an order calling the bond election, but not less than fifteen (15) days next preceding the day of election, any owner of real property in said district outside of an incorporated area may file with the county clerk a signed statement announcing that he or she is a candidate to be one of the first elected trustees of the district to serve as representative of the unincorporated area in the district. The board of trustees in calling the bond election shall provide a separate ballot on which shall appear the

names of the candidates and shall leave blanks in which the voters may write in additional name or names. * * *"

* * *

"In voting on the question of the issuance of the proposed bonds, none but such qualified voters as shall have paid a property tax in the district in the year next preceding the election shall be permitted to vote, but in voting on the election of trustees all qualified voters in the district outside the corporate limits of any municipality or incorporated area shall be permitted to vote.

"'Following the election of the first trustees any elected trustee or trustees shall be elected at an election held on the first Wednesday in December * * *"

* * *

"* * * The board of trustees shall furnish to the judges of election at every voting place a sufficient number of ballots * * * the county clerk shall furnish without expense to the district at least five days previous to the day of election a certified copy of a list of registered voters residing in the district outside of any municipality or incorporated area ***"

Section 17-6-3.1 not only deals with the election of trustees but also bond elections and permits the bond election to be held at the same time as the election of trustees.

If the above quoted provisions do not apply to a bond issue, there is nothing in the statute pertaining to the manner of holding a bond election, and therefore; the act is unconstitutional because it would deprive the people of their property without a hearing or a vote.

Amici Curiae contend in their brief that the county clerk is to furnish a list at the time of the voting on the Trustees, but no list of qualified voters shall be furnished at a bond election. This is certainly a strange construction of the act. Certainly the legislature would not mean such an interpretation because it is apparent that there were to be two qualifications before a person could vote on a bond issue. One is that he be a qualified voter residing in the district and two, pays a property tax. It is clear that the defendants Sewer District and the Trustees themselves place this interpretation upon the act because they put it in the resolution and recognized that if they didn't have it in their resolution and follow the statute, that the election would be void.

The purpose of such a list is to limit voting to persons residing within the boundaries of the special improvement district. It is just as important to limit voting to persons residing within the boundaries of the sewer district when voting on bond issues as when voting for trustees.

The statute permits the holding of a bond election at the same time of conducting an election of trustees. It is not logical to contend that the certified list of registered voters is required for holding an election of trustees, but is not necessary for holding a bond election. The purpose of the list is to limit the voting to people residing within the special improvement district.

POINT II

SECTION 17-6-3.3 REFERS TO A NON-EXISTING STATUTE.

Amici Curiae refer to Section 17-6-3.3 as the only section pertaining to bond elections. Section 17-6-3.1 is the only place where qualifications for voting either for trustees or bonds are specified. That section expressly states one of the qualifications for voting on bonds to be that: "none but such qualified voters as shall have paid a property tax in the district in the year next preceding the election shall be permitted to vote."

Section 17-6-3.3 reads as follows:

> "* * * The resolution calling the election shall be adopted, notice of the election shall be given, the election shall be held, voters' qualification shall be determined, and the results thereof canvassed in the manner at such time provided *by the laws of Utah for the holding of elections on the issuance of courthouse bonds by counties.*"

There is no statute in Utah for the holding of elections on the issuance of courthouse bonds by counties. The only section dealing with the requirements of voting on Bonds is Section 17-6-3.1.

No section of any Utah statute is referred to in section 17-6-3.3 for the simple reason that there is no such statute in existence in this State. There is no statute "for the holding of elections on the issuance of courthouse bonds by counties." The authority to hold a bond

election is derived from the Constitution as implemented by the statutes. If Amici Curiae are correct in arguing that the procedure for holding the bond election was embodied in a statute referred to without section number (which never was enacted in Utah), there was no authority to hold the special bond election and the election was void. In *Wilson v. Gonzales,* (N.M.) 106 P. 2nd 1093, it was held that the Legislature must provide for and regulate the conduct of an election or there can be no valid election. To the same effect is *State ex rel. Weatherford v. Hayworth,* (Or.) 53 P. 2d 1048. The statute referred to in Section 17-6-3.3 was adopted in one of the eastern States, but it has never been enacted in Utah. The procedure to be followed must be that outlined in the Utah statutes, not some statute of another state.

POINT III

THERE WAS NO COMPLIANCE WITH SECTION 20-2-26 EVEN IF IT WERE APPLICABLE.

Amici Curiae in their brief, on page 8, states: "The only statutory provisions for the furnishing of a list of the registered electors at special elections which has come to our attention is set out in Section 20-2-26, Utah Code Annotated, 1953." We set out the statute which is as follows:

> "20-2-26. AGENTS TO SUPPLY JUDGES WITH COPY OF REGISTER. — Before the day on which any special election is appointed to be held, and in cities of the first and the second class

> before the day on which any primary election is appointed to be held, the registration agent must furnish one of the judges in his election district, at a time not later than one day next preceding the day on which the election is to be held, a copy of the official register for his district, but no copies need be posted."

There are only two incorporated areas in the sewer district, one is the town of Riverton and the other is the town of South Jordan. If Section 20-2-26 applies then it became necessary for the registration agent to furnish the special election judges of the town of Riverton and South Jordan with a copy of the official register which was not done in this case. If Section 20-2-26 applies in this case, then it was not complied with in the incorporated areas of Riverton and South Jordan and therefore the election is void.

On page 8 of their brief Amici Curiae also state that "the registration list for each *precinct* was *available* at each polling place at which the election was conducted. (R. 64)." The record does not so show, but on the contrary shows that the only registration lists were those of the *general election districts,* four of which were bisected by the boundaries of the Sewer District. There were no registration lists for any special election *precincts.* If it is contended that general election districts 423, 436 and 444 were special election *precincts,* then the bond election was void because substantial portions of those general election districts were outside the Sewer District.

In the Brief of Amici Curiae it says on page 9: "Each person offering to vote at the bond election under attack was required to sign an oath. This is not a fact. There was no oath administered and there was no affidavit." (R. 117).

POINT IV

THERE IS NO BASIS FOR CONTENDING THAT THE LEGISLATURE HAS NOT PROVIDED A MANDATORY STATUTORY METHOD FOR DETERMINING QUALIFICATIONS OF VOTERS AT A SPECIAL BOND ELECTION.

AMICI CURIAE brief contends that there is no statute providing a mandatory method of qualification to be determined at a bonding election. That is not a fact. As pointed out above Section 17-6-3.1 requires the obtaining of a list of the registered voters by the County Clerk's office in the unincorporated areas and that section 20-2-26 Utah Code Annotated 1953 provides the furnishing of a list by the official register to the election judge of a district within an incorporated town. Section 17-6-3.1 Utah Code Annotated, 1953, specifies:

> "In voting on the question of the issuance of the proposed bonds, none but such qualified voters as shall have paid a property tax in the district in the year next preceding the election shall be permitted to vote."

The judges of the election have an affirmative duty to see that this statute is complied with and the evidence is that people residing outside of the sewer district were permitted to vote and 632 votes were cast by persons

whose names are not on the tax rolls and there was an obvious disregard of the above-quoted statute.

The election judges could not lawfully dispense with either the requirement that the voter has paid a property tax or that the voter be a resident of the Sewer District.

On page 9 of the brief, it is admitted that "at bond elections in improvement district, in addition to being qualified electors, persons voting must have paid a property tax in the district in the year next preceding the election." It is argued, however, that "there is no specific procedure set forth in the statutes" for determination of whether a person offering to vote resides in the district or paid a property tax. In substance Amici Curiae infer that the election judges should make such determination and that their decision in that respect cannot be questioned. There were 7 special election precincts, and if the matter of determining whether the voters were qualified under the statute were left for the decision of the judges, there could be 7 different standards of qualifications contrary to the statute and also contrary to the Constitution of Utah, "Declaration of Rights," Article I, Section 24:

> "All laws of a general nature shall have uniform operation."

There could be no possible uniform operation of the laws relating to bond election if each set of judges could be permitted to dispense with the plain requirements of

the statute and permit non-taxpayers to vote and also permit persons residing outside the special improvement district to vote, as occurred in this case.

On page 10 of that brief it is contended that if any resolution calling a bond election adds to the statutory requirements, the failure to follow such requirements not found in the statute will not invalidate the election. The fact is that the argument has no application for in this case the defendant board of trustees adopted a resolution requiring a list of the qualified voters residing within the sewer district, substantially in the language of the statute, so that there was no attempt to require something not found in the statute.

The resolution also specified that only qualified registered voters who had paid a property tax within the district would be permitted to vote, which was also in accordance with the requirements of the statute.

It is also argued by Amici Curiae that the "determinations of the election judges, not challenged until after the election, are final." Counsel failed to cite any cases holding that election judges can dispense with the statutory requirements and permit people to vote who are not taxpayers and who do not reside within the special improvement district. The case of *State v. Smith,* 115 S.W. 2d 816, 824, cited by Amici Curiae actually holds just about the opposite to what it is cited to support. In that case the election judges required certain proof that voters were taxpayers, and refused to allow any

one to vote if he failed to submit the required proof. That case does not hold that election judges can dispense with the requirements that only taxpayers residing within the special improvement district shall be permitted to vote.

Also, in the case of *State v. Smith,* supra, the contestants attacked the resolution itself. In the instant case we contend that defendants did not comply with the resolution and with the statute. In the *State v. Smith* case there is cited the United States Supreme Court case of *Browning v. Hooper,* 269 U.S. 396, 46 S. Ct. 141 70 L. Ed. 330 in which the U.S. Supreme Court holds that property owners not having the right to a hearing, the Texas statute would be void.

On page 10 is cited the case of *Hamilton v. Village of Detroit,* 85 N.W. 933, (Minn. 1901). The officials complied with the statute in that case, although the resolution that the board passed was not complied with; but in the instant case the statute was not complied with nor was the resolution complied with. The same distinction can be made as to the *Stuessy v. City of Louisville,* 161 S.W. 564, (Ky. 1913) and the case of *Cameron v. Conley,* cited on page 11 of Amici Curiae brief. The *Stuessy v. City of Louisville* case 161 S.W. 564 page 568 also states:

> "The courts have uniformly held that when the statute expressly or by fair implication declare an act to be essential to a valid election or that an act should be performed in a given manner and in no other such provisions are exclusive and mandatory."

And on page 565 the court states:

> "If, however, any essential requirement has been omitted, the bonds cannot be lawfully issued and their execution should be restrained."

POINT V

PLAINTIFF FURNISHED PROOF THAT SUFFICIENT ILLEGAL VOTES WERE CAST TO CHANGE THE RESULT OF THE ELECTION AND SHOWED THAT THE ELECTION WAS NOT HELD IN ACCORDANCE WITH UTAH STATUTES AND THE RESOLUTION OF THE SEWER DISTRICT.

Respondent showed that there were 632 votes cast by persons who were not on the tax rolls of the sewer district and that there is a question as to whether or not 61 persons who voted were the same persons who were on the tax rolls, (R. 44-54). People voted who lived outside of the sewer district, (R. 68-69-71). The election was declared carried by margin of only 95 votes. At a prior election NOT HELD on the day of a general election the bond issue was defeated. There is a large portion of the district that cannot be served by the sewer; only 25% of the sewer district can be served by the sewer as now contemplated.

The evidence clearly shows that the plaintiff furnished proof that sufficient illegal votes were cast to change the results. Amici Curiae contend that the burden in an election contest is on the plaintiff, but the cases they cite do not apply to the facts in this case because the manner of holding the election is being attacked and not merely the result of the tabulation. This point is

discussed in Respondents' Brief pages 8 to 15. We pointed out that because the defendants did not comply with the Utah statutes and their resolution pertaining to the holding of a bond election, that such election is void.

The defendants cite *Shrock v. Hylton,* 133 S.W. 2d 175 (Texas 1939). In that case is cited the case of *Yetts v. Cook,* 281 S.W. 837 115 Tex. 205. The Yetts case at page 839 states:

> "Construing the various statutes bearing on the subject in the light of the constitution shows conclusively that the provisions relating to poll tax lists are mandatory."

The Shrock case pertains to a special election, not a general election. The Shrock case states as follows:

> "There is no provision of the statute requiring a poll list of the qualified voters of the district as is required in the general election statute."

Also it states:

> "The election in question was held under and governed by the provisions of the special statute relating to Fresh Water Districts and not under the General Election Statute. General election law does not apply to special elections held under a special law."

We contend that the special statute 17-6-3.1 would prevail rather than any general statute.

Amici Curiae's brief cites *Marks v. Jackson,* Texas Civil Appeal, 130 S.W. 2d 925, 927. In that case it was stipulated that the 11 votes which were contested were cast against the bond issue so that by excluding the 11 votes the bond issue would have carried by a greater margin. That case was entirely different from the instant case.

In the *Rosenbrock v. School District No.* 3, 74 N.W. 2d 32 (Mich. 1955) cited on page 13 of Amici Curiae's brief, the Court sets down the rule that it would hold the election void for irregularities, but that even if all the irregularities were found in favor of the contestant it would still not change the results. These are not the facts in the instant case and it is authority for the rule that where they do not comply with the statute the election will be held void. The Court says:

> "When the result of a poll as shown by the return is false and fraudulent and it is impossible to ascertain the actual vote from the other evidence in the case, the vote of such portion must be wholly rejected."

And the Court further states:

> "Issuance of the writ was denied by this court on the grounds that an eligible class of voters had been excluded from participating in the election and that as a result it was void."

The case of *Duncan v. Vernon Parish School Board,* 76 So. 2d 403, 404, (La. 1954) was decided under a peculiar statute and is distinguishable from the facts

in the instant case. That case cites 29 C.J.S. Election Section 274 which holds that the burden of proof is on the contestant, but that the burden has been overcome when the contestant shows that people voted whose names did not appear on the official list of the voters, citing the case of *Silver v. Brown,* 284 S.W. 997, 215.

On pages 14 and 15 of Amici Curiae's brief they cited four Utah cases. Those cases were contests as to whether or not the votes had been properly counted. There was no contention that voters were not qualified to vote. The instant case is a contest that the voters were not qualified to vote and that the election was irregularly held. This is not a case involving the election of people to office, but a bond election. Respondents already have discussed these points in their brief, pages 8-15.

POINT VI

EXHIBIT D-3 DOES NOT AMOUNT TO AN ADEQUATE AFFIDAVIT SINCE IT DOES NOT SET FORTH THE NECESSARY PROBATIVE FACTS.

As to what has been done in other cases or in other districts has no bearing upon this case. In this case they used a statement which was not an affidavit and it did not contain the necessary facts to determine if the voter had property. The statute specifies only qualified voters who have paid a property tax on property within the improvement district within the year preceding the bond election will be permitted to vote. The special improve-

ment district officer nor an election Judge has any authority to dispense with those requirements or to allow the voter to determine if he is qualified.

If this Court should desire to decide this point, that an affidavit is proper then this purported statement Ex. D3 is not sufficient because it is not an affidavit. It did not show the voters address so it could be determined if they resided in the improvement district. It did not sufficiently identify the property they claimed to have paid a tax on so it could be determined if it were in the boundaries of the district or to determine who paid the tax.

The instant case clearly demonstrates that the statement they used did not accomplish its purpose when there were 630 persons voted whose names were not on the tax rolls. *Henry v. Oklahoma City,* 108 P.2d 148, is cited. That case held that the affidavits were invalid since they did not show that the voters actually resided within the boundaries of the city in question. There is also a statute in Oklahoma which says that the presumption is that the returns are correct.

They cite the case of *Morgan v. Board of Supervisors* 192 P.2d 236 (Ariz. 1948) which states:

> "It is the duty of an election board to see that all who are justly entitled to vote are permitted to do so, and those not entitled to this privilege are prevented from exercising the right."

Applying that statement to the facts in this case it is clear that the trustees and the Sewer District judges did not comply with it.

A. NO TAX RECEIPTS SHOWING PAYMENT OF A TAX ON PROPERTY WITHIN THE SEWER DISTRICT WERE REQUIRED BY THE ELECTION JUDGES.

The election judges had neither a list of voters residing within the sewer district nor a list of voters whose names are on the tax rolls. Nor did the special election judges require the production of any tax receipt to establish the right to vote. The question presented by Amici Curiae is therefore inapplicable to the facts of this case.

POINT VII

THE BRIEF OF THE AMICI CURIAE ATTEMPTS TO INJECT INTO THIS CASE ISSUES WHICH WERE NOT RAISED.

Amici Curiae have injected into this case on page 20, 21 and 22 of their brief hypothetical questions and are assuming facts contrary to the record on appeal. We submit that this should not be allowed. The rule of law is that Amici Curiae cannot inject issues which were not raised in the Trial Court. See 3 C.J.S. Amicus Curiae, Section 3 (9) page 1052:

> "In view of the rule that an amicus curiae must accept the case before the court with issues as made by the parties, a new question raised only in a brief filed by an amicus curiae, by leave of court, will not be considered."

For example on page 22 of their brief they state:

> "In the first place, the current assessment and tax rolls are seldom classified and divided in such manner as to make it easily ascertainable whether taxpayers had paid taxes on property within the limits of a particular school or improvement district."

This is not a statement of the fact. The fact is that when there is a new taxing unit the county assessor makes up a blotter which shows all the property in a particular taxing district. In the instant case, there was no blotter prepared at the time of the trial of the case covering the Sewer District, but when plaintiff's trustees attempted to levy a tax, a blotter was made and is now in existance, and the blotter shows what property is in the district and the ownership thereof.

Section 20-7-18, Utah Code Annotated, 1953, cited on page 20 of Amici Curiae's brief has no bearing whatsoever on the points here involved. It does not attempt to cover the subject matter of determining the qualifications of voters in a bond election. The Court did not disregard any evidence; he allowed to be put in evidence Exhibit D-3 and the fact that an oath WAS NOT administered and the circumstances surrounding the use of Exhibit D-3.

When the Court said he was not going into that matter (R. 115) he had reference to that portion of the complaint which raised the question of the constitution-

ality of the act and the constitutionality of people being required to pay a tax when they could not possibly receive any benefit from it.

POINT VIII

WHO IS ENTITLED TO VOTE? THE HOLDER OF THE LEGAL TITLE OR THE PURCHASER UNDER CONTRACT?

This point was discussed at the pretrial conference, and the matter was discussed in Appellant's brief page 10 and Respondents' brief at page 22 and 23.

The question is—who can vote? The purchaser under contract who pays a tax, or the seller in whose name the tax is assessed?

In the brief of Amici Curiae, they cite some cases holding that the purchaser who has paid a tax may vote. They cite other cases holding that the seller who has the legal title may vote, but we respectfully submit that both cannot vote.

In using Exhibit D-3, the so-called 'affidavit,' both the record owner and the purchaser could vote by signing such statement. The election judges must see to it that only qualified tax payers are permitted to vote. They have no authority to leave the decision to the voters as to whether the record owner is entitled to vote or the purchaser under contract, or to allow both to vote at their discretion as occurred in this case.

POINT IX

THE WIFE OF A TAXPAYER HAS NO RIGHT TO VOTE IF SHE HAS ONLY AN INCHOATE RIGHT.

This matter was argued in appellant's brief at page 9 and in respondent's brief at page 23.

The cases cited by Amici Curiae as to whether joint tenants and tenants in common may vote have no bearing in this case because joint tenants and tenants in common were not included in the list of 632 voters.

It was conceded by defendants that non-taxpaying wives of taxpayers were allowed to vote.

As pointed out in the brief of respondent, the inchoate right of dower is not a vested right and it is not taxed. By no stretch of the imagination could a non-taxpaying wife be deemed a 'taxpayer' within the meaning of a statute limiting the right to vote to qualified taxpayers. Nor can a person exempt from tax be allowed to vote because he or she is not a taxpayer. If the argument relating to the inchoate right of dower were followed to its logical conclusion, then all of the prospective heirs at law of a taxpayer should be allowed to vote because their title vests upon the death of the taxpayer the same as the inchoate right to dower vests upon the death of the husband.

POINT X

THERE IS NO ISSUE IN THIS CASE AS TO VALIDITY OF ANY OUTSTANDING BOND.

This suit was brought to prevent the sale of bonds, not to adjudicate any rights which would effect bonds heretofore sold in some other improvement district.

We are surprised that Amici Curiae should infer that we seek to impair the validity of bonds outstanding in some other district. No bonds have ever been issued by defendant Sewer District, and no bonds could possibly be invalidated by this litigation.

This point was never raised in the case. Amici Curiae attempt to inject into the appeal some non-existing issues.

POINT XI

AMICI CURIAE NOT BEING PARTIES TO THE LITIGATION HAVE NO STANDING TO ASK FOR DISMISSAL OF THE COMPLAINT NOR TO QUESTION THE PRETRIAL PROCEEDINGS.

The complaint and the Motion for Summary Judgment were adequate and neither was questioned by the appellants in the lower court nor in this court. Amici Curiae has no right to create new issues in this court. 3 C.J.S. Amici Curiae, Section 3 (9) page 1052 (supra).

Amici Curiae make the unusual attempt to challenge the complaint to which they are not parties, for failure to state at which polling places the illegal votes were cast. Independent of the lack of right of Amici Curiae to challenge the complaint, the complaint clearly states that the election was void: (a) For being held at the same

time as the general election contrary to law; (b) for failure to comply with the requirements of the statute, including the failure to have a certified list of the qualified voters residing within the Sewer District; (c) for failure to check the qualifications of voters and to see to it that they met the qualifications required by law; (d) for allowing more than 95 persons to vote who had not paid a property tax in the district, and (e) other irregularities.

We respectfully submit that under the allegation of our complaint and the motion for summary judgment, evidence introduced, interrogatories, and Request for Admissions and discussions at the pre-trial conference that the invalidity of the election was properly before the court. In Amici Curiae brief they set out the rule of law that the Supreme Court will not pass upon a question which was not raised in the Trial Court, but they violated the rule they assert.

POINT XII

INVALIDITY OF NOTICE AND FORM OF BALLOTS WAS RAISED IN THE LOWER COURT

Plaintiff's complaint, motion for summary judgment and the affidavits attached thereto, evidence introduced, request for admissions and interrogatories, all were directed at the invalidity of notice and form of ballots and other irregularities which invalidated the special bond election.

Just one example. Paragraph 5 of the Motion for Summary Judgment clearly states the published notice of the special election was void. The motion was duly supported by affidavits showing that voters in two districts voted at entirely different places from those specified in the notice. The motion also pointed out that the notice invited all people in the regular election districts to vote although portions of four districts were outside the boundaries of the Sewer District. The Judgment states:

> "2. This Judgment does not preclude the assertion of any other grounds herein not ruled upon set out in the Motion for Summary Judgment for the purpose of sustaining the judgment that said election is void." (R. 79, 113)

We have heretofore argued that the Judgment holding the election void should be affirmed because there was a lack of compliance with the statute.

The rule is that a Judgment right in result will not be reversed because some reason for it was not correct. A judgment should be affirmed on any ground which is proper, although not the reason stated by the Trial Judge.

Amici Curiae seek to inject entirely new issues into the case, thus, disregarding the pre-trial proceedings, admissions and undisputed evidence.

POINT XIII

BALLOTS SUBMITTED AT THE ELECTION MUST SPECIFY PLAN FOR PAYMENT AS PROVIDED BY SEC-

TION 17-6-3.2. WHETHER IT IS PAYABLE FROM TAXES OR FROM OPERATING REVENUE OR FROM A COMBINATION OF BOTH.

The form of ballot was introduced in evidence and is on the third page of plaintiff's Exhibit 2. It does not comply with Section 17-6-3.2 because the statute requires the trustees by the ballot to submit to the voter one of three plans: (a) A plan to redeem the bonds entirely from tax levies, (b) a plan to redeem the bonds entirely from district operating revenue and fees, and (c) a plan to redeem the bonds from a combination of both. The statute require the trustees to submit to the voters which plan it will follow so that the voters may make the decision as to whether to approve or reject the bond issue, and the general plan for retirement of the bonds. The ballots did not specify which of the three plans would be adopted.

The ballots should have clearly stated which of the three plans and the taxpayers should have been given a choice.

POINT XIV

THE TRIAL JUDGE PROPERLY GRANTED SUMMARY JUDGMENT SINCE THERE WAS EVIDENCE THAT THE ELECTION WAS VOID.

It is undisputed that the bond election was held at the same time as the general election and that there was no authority of law for holding such bond election at the same time.

This special election was called and held on the same day as the general election; therefore, there was no need for the trial court to require testimony to establish the illegality thereof. See Brief of Respondents, pages 15 to 19.

CONCLUSION

The election was not held in accordance with the statutes of the State of Utah; and therefore, the judgment should be sustained.

The affirming of the judgment will not effect any outstanding bonds.

We respectfully submit that the improvement district should comply with the statute.

There is no need to decide hypothetical questions raised by Amici Curiae, but not raised in the Trial Court.

We respectfully submit there are a number of reasons for affirming the judgment of the Trial Court as set forth in the original Brief of Respondents.

Respectfully submitted,

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